LIBRARY
SUPREME COURT, U. S.

FILED
OCT 9 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73- 622

SOL MARGOLIS, ROCCO BISACCIA, EUGENE CIRIELLO, MARIO FELICE, FRANK MUSCENTI and JOHN McCAULEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(6299) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.

TABLE OF CONTENTS

Page

Petition 1

Opinion Below 2

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Materials Involved 3

Summary of the Facts 3

Reasons for Granting the Writ 8

I. There was insufficient evidence as a matter of law to bring this case within the purview of 18 U.S.C. Section 1955 since there was no evidence of a gambling enterprise of the "octopus-like" operation contemplated by Congress when it enacted The Organized Crime Control Act of 1970. This case is a striking illustration of blatant encroachment by the Federal Government into purely state jurisdiction. 8

II. The conviction on conspiracy was inconsistent with the charge of sydicated gambling under 18 U.S.C. Section 1955 since concerted action is an indispensable element of the gambling charge. 19

III. The wiretap orders are invalid because the persons whose conversations were to be monitored, and the types of conversations to be seized were not

Contents

Page

described with sufficient particularity. Nor was there a probable cause showing that five or more persons were engaged in the same gambling enterprise. 22

IV. Section 1955 of Title 18 of the United States Code is unconstitutional. 25

Conclusion 29

Appendix A - Order of U.S. Court of Appeals 30

TABLE OF CITATIONS

Cases Cited:

Baker v. United States, 393 F.2d 604 (9th Cir. 1968) . .21

Cummings v. Missouri, 4 Wall. 277, 320 28

Douglas v. City of Jeanette, 319 U.S. 157 27

Drehman v. Stifle, 8 Wall. 595, 601 28

Federal Trade Commission v. Bunte Brothers, Inc., 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881 . .18

Gebardi v. United States, 287 U.S. 112 (1932) 21

Kotteakos v. United States, 328 U.S. 750 (1946) 20

Pugach v. Dollinger, 277 F.2d 739 (2d Cir. 1960) aff'd, 365 U.S. 458 27

Rewis v. United States, 401 U.S. 808 (1971) 15, 18

Reno v. United States, 317 F.2d 499 (5th Cir. 1963) . . .21

Contents

Rovario v. United States, 353 U.S. 53 25

Stefanelli v. Minard, 342 U.S. 117 27

United States v. Altobella, 442 F.2d 310 (7th Cir. 1971) 16, 19

United States v. American Trucking Associations, 310 U.S. 534, 543-44 (1940) 15

United States v. Anthony, 145 F.Supp. 323 (M.D. Pa. 1956) 21

United States v. Bass, 404 U.S. 336 (1971) 11, 27

United States v. Becker, 2 Cir. 1972, 461 F.2d 230 .....14, 19, 22

United States v. Borelli, 2 Cir. 1964, 336 F.2d 376, 383, cert. denied, 379 U.S. 960 19

United States v. Brenna, 394 F.2d 151 (2nd Cir. 1968) cert. denied, 393 U.S. 839 17

United States v. Casalinuovo, 350 F.2d 62, (2 Cir. 1971) 20

United States v. Central Veal & Beef Company, 162 F.2d 766 (2d Cir. 1947) 20, 21

United States v. Chamlas, (9th Cir. 1972) 468 F.2d 234 22

United States v. Cogan, 266 F. Supp. 371 (S.D.N.Y. 1969) 21

United States v. Corallo, 281 F. Supp. 24 (S.D.N.Y. 1968) 21

Contents

Page

United States v. De Cesaro, E.D. Wis. 1972, 349 F. Supp. 546, 551 ..... 14, 23

United States v. Euphemia, 261 F.2d 441 (2 Cir. 1958) .20

United States v. Fiorella, 2 Cir. 1972, 468 F.2d 688 ..... 14, 19

United States v. Giordano, (March 1973) 22

United States v. Hagan, 27 F. Supp. 814 (W.D. Ky. 1939) 21

United States v. Holte, 236 U.S. 140 (1915) 21

United States v. Kahriger, 345 U.S. 22 at 40 (1953) ... 19

United States v. Katz, 271 U.S. 354, 357 (1926) ... 15, 21

United States v. Lovett, 328 U.S. 303, 322 28

United States v. McCormick, 442 F.2d 316 (7th Cir. 1971) 18

United States v. Miller, 379 F.2d 483 (7th Cir. 1967) 17, 19

United States v. New York Central & H.R.R. Company, 146 F. 298 (Cir. Ct. S.D.N.Y. 1906) 21

United States v. Perez, 402 U.S. 146 ..... 11, 27

United States v. Puntillo, 440 F.2d 540 (7th Cir. 1971) 17

United States v. Rizzo, 418 F.2d 71 (7th Cir. 1969) ... 17

Contents

Page

United States v. Roselli, et al, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924 17

United States v. Sager, 49 F.2d 725 (2d Cir. 1931) .20, 21

United States v. Vilhotti, 452 F.2d 1186 (2 Cir. 1971) .20

United States v. Wierzbicki, D.C.E.D. Mich. 9/15/72 12 Cr.L. 2076 .....11, 22

United States v. Zeuli, 137 F.2d 845 (2d Cir. 1943). 20, 21

Yankee Network v. F.C.C., 107 F.2d 212, 219-20 (D.C. Cir. 1939) 15

Younger v. Harris, 401 U.S. 37 10

Statutes Cited:

Title 28 U.S.C. Section 1254(1) 2

Organized Crime Control Act of 1970 .....8, 9, 10, 11

Title 18 U.S.C. Section 1952 .....3, 11, 15, 16, 18

Title 18 U.S.C. Section 1955 ... 2, 3, 8, 15, 19, 23-26, 28

Title 18 U.S.C. 2515 .....3, 22

Title 18 U.S.C. 2516 .....3, 22

Title 18 U.S.C. 2517 .....3, 22

Title 18 U.S.C. 2518 .....3, 23, 24

Title 18 U.S.C. 2518(1)(c) 24

Contents

Page

United States Constitution Cited:

Fifth Amendment **3, 28**

Ninth Amendment **3, 25**

Tenth Amendment **3, 25**

Fourteenth Amendment **3, 28**

Article I, Sections 9, 10 ..... **28**

Other Authorities Cited:

"The Attorney General's Program to Curb Organized Crime and Racketeering," Hearings before Senate Committee on the Judiciary, 87th Cong, 1st Sess. pp. 15-16 (1961) **12, 13**

U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970) **10**

Hearings on "Legislation Relating to Organized Crime" before Sub-Committee No. 5 of House Committee on the Judiciary, 87th Cong. 1st Sess., 1961, p. 336 ..... **13**

S. Rep. No. 644 ..... **12**

H. Rep. No. 966 ..... **13**

107 Cong. Rec. 16542 (1961) **12**

1961 U.S. Code Cong. & Adm. News, p. 2665 ..... **13**

16A C.J.S. Const. Law, Sections 452, 455, "Bill of Attainder" **28**

In The

Supreme Court of the United States

October Term 1973

No. 73-

SOL MARGOLIS, ROCCO BISACCIA,
EUGENE CIRIELLO, MARIO FELICE,
FRANK MUSCENTI and JOHN McCAULEY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that this Court will grant a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit rendered the 10th day of September, 1973, affirming without opinion the judgments of the United States District Court for the Southern District of New York, rendered the 5th day of March, 1973, as to everyone except appellant *Margolis*, and on the 19th day of March, 1973 as to him, convicting each of them of the crimes of violating 18 U.S.C. Section 1955 (organized gambling) and conspiracy to do so, after trial before Frankel, D.J., and a jury.

Each of the petitioners, except *Margolis*, was sentenced to three months imprisonment plus a fine and probation. Petitioner *Margolis* was sentenced to six months imprisonment plus a fine and probation.

OPINION BELOW

No opinion was rendered by the United States Court of Appeals herein.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C. Section 1254(1). The Order of the Court of Appeals is dated September 10, 1973.

QUESTIONS PRESENTED

1. Whether Section 1955 of Title 18 of the United States Code is constitutional?

2. Whether federal jurisdiction was properly invoked in view of the fact that the gambling activity herein was purely local in nature and on only one day slightly exceeded $2,000.00 in actual bets. Does the statute, 18 U.S.C. Section 1955, aimed at an "octopus-like" network of organized crime, justify the intervention of the federal government into this purely local activity?

3. Whether the conviction on conspiracy was inconsistent with the charge of organized gambling activity under 18 U.S.C. Section 1955, since concerted action is an indispensable element of the gambling charge, requiring at least five persons to participate jointly therein?

4. Whether the statute authorizing wiretapping, upon which the indictment and conviction herein was primarily based, is constitutional?

5. Whether the statute contemplates that even the most insignificant member of a gambling operation can be deemed to come within the statutory prerequisite of a person "conducting, financing, managing, supervising, directing, or owning an illegal gambling business", or must such person actually be in the higher echelon—that is, in a managerial or supervisory position, to come within the statute?

CONSTITUTIONAL AND STATUTORY MATERIALS INVOLVED

The Fifth, Ninth, Tenth, and Fourteenth Amendments of the United States Constitution are involved herein.

In addition, Sections 1952, 1955, 2515 through 2518, all of Title 18 U.S.C. are also germane.

SUMMARY OF THE FACTS

The gambling activity which is described in the record herein reveals that it is limited to two or three separate gambling operations of a purely intrastate nature with no apparent interstate ramifications. Moreover, the gambling operations are of such a small dimension that it is submitted that the minimum standards of the statute were not even met. It is the position of the petitioners that these minimum standards were not proven. We recognize, however, that a jury verdict was returned against them. Notwithstanding that fact, we would ask this Court to analyze the record carefully to determine whether or not the federal government should even have become involved in this type of local activity. We would ask this Court further to scan the record carefully to convince itself that the minimum requirements were in fact not achieved.

Bearing in mind that at least five or more persons must be engaged in a "*single*" gambling enterprise for a period of at least 30 days duration, or that at least $2,000 has been earned by this *single* gambling enterprise in any one day during the 30 day period, that then, and only then, would possible jurisdiction attach.

In addition, we submit that there must be demonstrated beyond a reasonable doubt that there was in fact a *single* gambling enterprise where five or more people conducted, managed, controlled and so forth, this operation.

Summary of Facts

While the Court below was of the opinion that anyone who is involved in the gambling enterprise, other than a player, was within the purview of the statute, the petitioners take a contrary view and submit that there must be some supervisory or managerial control in order to properly come within the five-man minimum standard which is required for federal jurisdiction.

Congress obviously did not believe that the Government should encroach upon purely State violations of law. The statute herein is designed to combat "octopus-like" organized racketeering type of gambling which has its tenacles spreading from state to state. There is no evidence in this case that this was any sort of gambling enterprise that can be described as an organized racketeering type of operation.

On the contrary, at least two, and perhaps three, separate gambling operations, none of which involves more than three people, was established.

It is the position of the petitioners herein that taking the evidence at its very best for the Government, that petitioners *Felice*, *Muscenti* and *McCauley* may have been engaged in a single gambling enterprise, although there is some doubt even as to that, and *Bisaccia* and *Ciriello* may have been engaged in another separate gambling enterprise. A third possible gambling enterprise might have existed between *Margolis* and *Ciriello*.

There is no tieup between the gambling enterprises of *Felice*, *Muscenti* and *McCauley* and those of *Margolis* and *Ciriello* or of *Bisaccia* and *Ciriello*.

The evidence herein scarcely establishes the very minimum requirements. Without a doubt, the Government failed to prove that the gambling enterprises existed for a 30 day period continuously, or had $2,000 earnings in *one* day.

Summary of Facts

They brought in an expert, Agent Whitcomb, of the Federal Bureau of Investigation, who declared that on a particular day, March 11, 1972, approximately $4,400 was earned. After cross-examination, particularly by defense attorney, Lanna, it became obvious that this agent was lumping together "if" or "contingent" bets and regular bets. "If" bets cannot be cumulative since they are not bets unless certain contingencies occur, in which case the alternative would be eliminated. So, the expert apparently was operating upon a theory which was completely untenable. Even there, the Government maintains that over $2,000 was established, although we maintain that the record leaves substantial doubt that this was in fact the case.

The position of the District Judge that anyone involved in the gambling operation, except a player, no matter how lowly and insignificant his position, came within the statutory definition of "conducting, financing, managing, supervising, directing, or owning an illegal gambling business", was too broad.

The witnesses produced by the Government each revealed that he or she was a small neighborhood better who placed wagers occasionally with *Felice*, or with *Muscenti*, or *McCauley*, at one of two different places; while other of the witnesses stated that they placed bets with *Ciriello* and *Bisaccia* at the Waverly Food Market,—a different place completely,—where *Ciriello* and *Bisaccia* ran a full-time grocery store. None of the witnesses called by the prosecution, in any way, shape, or form, established that petitioner *Margolis* was in any way, shape or form, involved in the taking or accepting of any of the bets of the witnesses. As a matter of fact, no witness was able to identify him.

The evidence as to *Margolis* reveals that on some few occasions he had conversations, only with *Ciriello*, where possibly laying off a bet may have been discussed, or some

other casual information as to the "line" or odds might have been talked about.

There is no tie-in whatsoever between *Margolis* and any of the petitioners, other than *Ciriello*. Even in the case of *Ciriello*, however, the tie-in is obviously not that of a joint business venture, but of one independent gambler, that is *Ciriello*, asking some information of another independent gambler, or in the case of an unusually large bet, perhaps asking if something could be "laid off".

It should be noted that an "unusually large bet" in this enterprise, involving *Ciriello* and perhaps *Bisaccia* was a pittance as to what one might consider an actual large bet.

The operations were of such a small nature that it is difficult to understand how the Government even involved itself in this investigation, and how a Grand Jury even returned an indictment.

It is submitted that the case at bar revealed that the statute has been perverted well beyond the intent of Congress which unquestionably sought to avoid the very thing that happened here; i.e., that a purely local, small gambling enterprise should become the subject of prosecution.

The statute being under the "Organized Crime" sections, was obviously designed to prosecute major syndicated or organized crime type of gambling and not a local neighborhood operation or operations.

Finally, in this Introductory, we submit that an analysis of the record leaves no doubt that the Government failed to prove that five or more people were engaged in a single gambling enterprise.

Summary of Facts

We also submit that since both conspiracy and a violation of Section 1955 were charged, there was a misjoinder of offenses. The Grand Jury concluded that there was a probable violation of Section 1955 which requires the cooperation of five or more persons under certain circumstances. Assuming that those circumstances are proved in the record, a fact which we deny, it is nevertheless obvious that the petitioners could not also be charged with conspiring to violate that Section. Since concert of action is an essential element of the violation of Section 1955, the petitioners cannot be guilty of also conspiring to violate that section which in effect involves exactly the same conduct.

Finally, it should be noted that the proof at trial revealed that no one gambler participated in placing bets with any group consisting of five persons. In other words, where a gambler had placed a bet with *Muscenti* or *Felice* or *McCauley*, that same gambler did not place any bets with *Bisaccia* or *Ciriello*. The converse is also true. No gamblers placed any bets with *Margolis*.

Another aspect of serious error in the record was the permission of the Court to allow the Government to place a diagram on the blackboard showing that a gambler, Joe Tuck, made a telephone call from a public phone booth at Jim's Athletic Club which was operated by *McCauley*, to the Debonaire Social Club where *Felice* sometimes hung out. This telephone call was for the purpose of placing a bet with *Felice*. There was no evidence whatsoever, however, that the making of the telephone call from the public phone booth at Jim's Athletic Club had anything to do with a linkup between the Athletic Club and the Debonaire Social Club. Nevertheless, the Government laid great stress on that fact in order to prove the conjoining of five or more persons in this violation. The Government even saw fit to refer to this in its summation.

It is therefore quite patent that there was insufficient evidence as a matter of law to have warranted the submission of this case to the jury.

REASONS FOR GRANTING THE WRIT

I.

There was insufficient evidence as a matter of law to bring this case within the purview of 18 U.S.C. Section 1955 since there was no evidence of a gambling enterprise of the "octopus-like" operation contemplated by Congress when it enacted The Organized Crime Control Act of 1970. This case is a striking illustration of blatant encroachment by the Federal Government into purely state jurisdiction.

The evidence in this case reveals that only by the most ingenious manipulation of betting information was the Government able, through its expert, to establish that perhaps slightly more than $2,000 was bet on one day by the entire gambling operations of the six people allegedly involved in this case. It was apparent that the expert, Agent Whitcomb, had misconstrued the nature of many of the bets which he interpreted, such as "if" bets, as a result of which even he had to concede that his estimate of $4,400 on the one day where in excess of $2,000 was extrapolated, was grossly excessive.

The point which petitioners wish to drive home, however, is that there was absolutely no evidence at all of an interstate racketeering operation but, on the contrary, all of the witnesses who testified concerning the placing of bets revealed that these were small neighborhood bookmakers who ran a very modest gambling business which cannot in any way, shape, or form be described as a large-scale or "octopus-like" operation.

Reasons for Granting the Writ

This case is a clear example of the encroachment by the Federal authorities into a purely state crime.

It must be remembered that when Congress passed the "Organized Crime Control Act of 1970", it was concerned with organized, large-scale, illegal activities. Congress found that:

> "(1) organized crime is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because the defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government are unnecessarily

limited in scope and impact." U.S. Code Cong. & Adm. News, Public Law 91-452, p. 1073 (1970).

There was no evidence whatsoever against *Sol Margolis* that he in any way participated with any of the petitioners other than *Ciriello*. In the case of *Ciriello* there were desultory telephone conversations concerning possible laying-off of a bet and discussion of odds. There was never any contact between *Margolis* and anyone else charged in the indictment.

The indictment itself charged only six people, one more than the statutory minimum, with a violation of the Organized Crime Control Act. The evidence however, disclosed that *Muscenti*, *Felice* and *McCauley* operated completely separately and apart from *Bisaccia* and *Ciriello*. As a matter of fact there was a serious question whether there was a nexus established among *McCauley*, *Muscenti* and *Felice*. The Court permitted the jurors to "speculate" about this nexus by admitting testimony of a telephone call made from a public pay phone by a player, Tuck, located at Jim's Athletic Club, to *Felice* at the Debonaire Social Club. Since Tuck was not a co-conspirator and the phone used was a public pay phone, this was highly prejudicial.

Ciriello and *Bisaccia* were only part-time bookmakers since they operated a full-time grocery store, the Waverly Food Market. Even the federal surveillance team corroborated this fact.

The United States Supreme Court has held that the federal government should be reluctant to encroach on areas which have traditionally been left to the states (*Younger v. Harris*, 401 U.S. 37).

Frequently, in the past, federal criminal prosecutions have been struck down when proof of a nexus with

interstate commerce has not been established. *(United States v. Bass*, 404 U.S. 336 (1971)).

We are of course aware of *United States v. Perez*, 402 U.S. 146. In the *Perez* case there was a specific Congressional intent to supersede state legislation in a particular field.

In the statute herein involved, however, Congress has not indicated a desire to preempt the field except where there is clear evidence of an "octopus-like operation contemplated" under the Organized Crime Control Act of 1970. There will obviously be a severe taxation of federal police resources if every illegal gambling operation that encompasses five persons, no matter how local in nature, is to be prosecuted by the federal government. (See *United States v. Wicrzbicki*, D.C.E.D. Mich., 9/15/72, 12 Cr.L. 2076.) No inference of preemption of the entire field should be inferred. *(California v. Zook*, 336 U.S. 725, reh. denied 337 U.S. 921 (1949)).

It may be appropriate to consider some legislative history interpreting the analagous sections of the Organized Crime Control Act (18 U.S.C. Section 1952).

Attorney General Kennedy, who sponsored the statute, described the statute's narrow purpose and scope as follows:

> "Mr. Chairman, we have one more bill, S. 1653, which is perhaps the most controversial and certainly one of the most important. *We are seeking to take effective action against the racketeer who conducts an unlawful business, but lives far from the scene in comfort and safety*, as well as against other hoodlums.

Reasons for Granting the Writ

> "*Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill.* We specifically have outlined the illicit operations we seek to curtail as those involving gambling, liquor, narcotics, prostitution businesses or extortion or bribery in violation of State or Federal Law.
>
> "The target clearly is organized crime. *The travel that would be banned is travel in furtherance of a business enterprise which involves gambling, liquor, narcotics, and prostitution offenses, or extortion or bribery.* Obviously, *we are not trying to curtail the sporadic, casual involvement in these offenses but rather a continuous course of conduct sufficient for it to be termed a business enterprise.*" *(The Attorney General's Program to Curb Organized Crime and Racketeering.* Hearings before Senate Committee on the Judiciary, 87th Cong. 1st Sess. pp. 15-16 (1961) (hereinafter "Senate Hearings"), quoted in S. Rep. No. 644, *supra*, p.3)(Emphasis added).

On several occasions, various members of Congress expressed concern as to the possible breadth of the bill's coverage. For example, Senator McClellan and Congressman Harris, in a joint letter, questioned the Attorney General about the possible effect of the bill on otherwise honest businessmen whose activities might touch upon one or more of the "unlawful activities" mentioned. In his reply, the Attorney General interpreted the term "unlawful activity" as used in the bill (107 Cong. Rec. 16542 (1961)).

The Attorney General went on to assure Congress, in the most forceful language, that the bill did not apply to persons, such as the defendants herein, having no connection with *organized* crime:

Reasons for Granting the Writ

> "*American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills.* The only toes tread on here are those of the racketeers and hoodlums" (Senate Hearings, p. 17). (Emphasis added.)

Assistant Attorney General Miller gave a similar explanation of the term "unlawful activity" in his testimony before the House Judiciary Committee:

> "H.R. 6572 bans unlawful businesses — *not incidental illegal acts done in the course of lawful businesses.* Since the bill in addition would require proof of the requisite intent before a violation would be made out, I believe that *the scope of H.R. 6572 in no way threatens the activities or rights of any persons other than the organized criminals at whom it is aimed.*" (Emphasis added.) (Hearings on "Legislation Relating to Organized Crime" before Sub-committee No. 5 of the House Committee on the Judiciary, 87th Cong. 1st Sess., 1961, p. 336.)

The report of the House Judiciary Committee, recommending passage of Section 1952, summarized Attorney General Kennedy's testimony on the scope of Section 1952 and stated in conclusion that (H. Rep. No. 966, *supra*, reprinted at 1961 U.S. Code Cong. and Adm. News, p. 2665):

> "The interstate tentacles of this *octopus* known as 'organized crime' or 'the syndicate' can only be cut by making it a Federal offense *to use the facilities of interstate commerce in carrying on of these nefarious activities.*"

Reasons for Granting the Writ

It should be noted that in the case at bar there were no interstate telephone calls, nor was there any evidence of gambling that occurred outside of a small section of a residential neighborhood in the City of Yonkers. The occasional telephone call between *Ciriello* and *Margolis* did not evidence any large-scale syndicate-type of gambling operations.

In *United States v. Becker*, 2 Cir. 1972, 461 F.2d 230, and *United States v. Fiorella*, 2 Cir. 1972, 468 F.2d 688, the United States Court of Appeals for the Second Circuit upheld convictions for a violation of this section. It is submitted, however, that in those cases there was more evidence of an organized type of gambling operation than in the case at bar.

We recognize *arguendo*, that Congress does have a right to legislate where a true organized crime "octopus-like" operation is involved. The statute was never intended to encompass the small neighborhood gamblers depicted in this case. The Government just about eked out the statutory minimum, although we submit that a perusal of the expert's testimony will cast doubt even upon that accomplishment.

It must be remembered that in the *Becker* case, *supra*, it was conceded that the gambling operation existed for more than thirty days and grossed more than $2,000 daily, the only question there remaining was whether at least five of the seven persons named were conducting an illegal gambling business. (See Appellant's Brief in *Becker*, p. 17.)

We submit that the mere finding that five people were engaged in gambling, does not necessarily mean that they were engaged in the gambling together.

In *United States v. De Cesaro*, E.D. Wis. 1972, 349 F. Supp. 546, 551, the Court aptly explained:

Reasons for Granting the Writ

> "In summary, Section 1955 requires as an element of the offense described therein that five or more persons participate in a gambling business. It is obvious that the statute contemplates that five or more persons join together in some manner in the *same gambling* business in order that that business be declared illegal under the statute." (Emphasis ours.)

There is nothing in the statute itself or in its legislative history to indicate the Congress intended to enact a bill which would bring purely local conduct under federal regulation. Accordingly, under well-established principles, the statute should not be construed to permit such a result. See, e.g., *United States v. American Trucking Associations*, 310 U.S. 534, 543-44 (1940); *United States v. Katz*, *supra*, 271 U.S. 354, 357 (1926); *Yankee Network v. F.C.C.*, 107 F.2d 212, 219-20 (D.C. Cir. 1939), and cases cited therein.

In *Rewis v. United States*, 401 U.S. 808 (1971) the Supreme Court rejected an expensive government interpretation of Section 1952 where the defendants had operated a gambling establishment located in Florida which was frequented by nearby residents of Georgia who travelled interstate for that purpose. The Court observed, "Petitioners are Florida residents and there is no evidence that they at any time crossed state lines in connection with the operation of their lottery" (p. 810). In reversing the convictions, the Court emphasized the intent of Congress to strike at the truly interstate operations of organized crime (p. 811):

> "Legislative history of the Act is limited, but does reveal that Section 1952 was aimed primarily at *organized* crime, and more specifically, *at persons who reside in one State while operating or*

> *managing illegal activities in another*" (emphasis added).

In addition, the Court, "struck by what Congress did not say" (pp. 811-812), refused to give broad application to Section 1952 particularly since Congress gave no indication that it wishes to (p. 812):

> "... alter sensitive federal-state relationships, ... overextend limited federal police resources, ... [or] produce situations in which ... a matter of happenstance, would transform relatively minor state offenses into federal felonies."

It is clear, therefore, that "what Congress did not say," either in Section 1952 itself or in its legislative history, was that an otherwise strictly local crime, wholly lacking in interstate character, can be transformed into a federal felony by means of telephone calls, which were entirely intrastate.

In *United States v. Altobella*, 442 F.2d 310 (7th Cir. 1971) the Court of Appeals reversed the convictions of two extortioners under 18 U.S.C. Section 1952 where the government claimed federal jurisdiction on the basis that the victim's check had been sent by mail between Chicago and Philadelphia. In so holding the Court states (pp. 314-316):

> "That Congress did not intend to exercise its full constitutional powers in the area of local law enforcement is demonstrated by the working of the Act...
>
> * * *
>
> "To warrant federal intervention we believe the statute requires a more significant use of a facility

of interstate commerce in aid of the defendants' unlawful activity than is reflected on this record. . . (citations omitted).

"Thus, a gambling operation conducted on an interstate carrier, *United States v. Brenna*, 394 F.2d 151 (2nd Cir. 1968) cert. denied, 393 U.S. 839; or by regularly traveling across a state line to obtain essential supplies, *United States v. Puntillo*, 440 F.2d 540 (7th Cir. 1971); the employment of out-of-state specialists in aid of the criminal enterprise, *United States v. Roselli, et al.*, 432 F.2d 879 (9th Cir. 1970), cert. denied, 401 U.S. 924; the use of interstate 'credit cards' and mailing lists to attract out-of-state patrons, *United States v. Rizzo*, 418 F.2d 71 (7th Cir. 1969); and the use of a Western Union ticker tape recording information received from out of state as a regular and continuous element of the illegal enterprise, *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967); all provide examples in which federal assistance to local law enforcement is entirely appropriate and clearly contemplated by the history and language of the Travel Act.

"But there is nothing about the appellants' enterprise, as disclosed by the evidence, which suggests any reason why state police powers need to be supplemented by the federal government. The use of the mails by the bank through which appellants' victim's check was cleared, a few days after it had been cashed — was purely incidental to appellants' sordid scheme. Their purpose would have been achieved equally well if the victim had borrowed $100 from associates at the hotel or written a check on a local bank. Moreover, the unlawful activity which followed the cashing of the

check was merely the payment of $50 to Patterson. Unquestionably, the distribution of proceeds of criminal activity may satisfy the 'thereafter' requirement of the statute in a proper case. But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed. Unquestionably, the distribution of proceeds of criminal activity may satisfy the 'thereafter' requirement of the statute in a proper case. But when both the use of the interstate facility and the subsequent act are as minimal and incidental as in this case, we do not believe a federal crime has been committed.

"Unquestionably appellants' unsuccessful attempt 'to make a fast buck' is punishable as a crime. We merely hold that the State of Illinois is the appropriate sovereign to prosecute their offense. We do not believe Congress intended to authorize federal intervention in local law enforcement in a marginal case such as this. We are guided by the Supreme Court's admonition 'that in ascertaining the scope of Congressional legislation a due regard for a proper adjustment of the local and national interests in our federal scheme must always be in the background . . .' *Federal Trade Commission v. Bunte Brothers, Inc.*, 312 U.S. 349, 351, 61 S.Ct. 580, 582, 85 L.Ed. 881."

Similarly, in *United States v. McCormick*, 442 F.2d 316 (7th Cir. 1971) the Court of Appeals reversed defendants' convictions under 18 U.S.C. Section 1952 of having used the mails to facilitate a lottery forbidden by Indiana law. In so holding, the Court stated (p. 318):

> "Here too the activities engaged in by defendant were essentially local. The role played by the interstate mailings was 'a matter of happenstance' and 'minimal and incidental' to the operation of the illegal lottery. As in *Rewis* and *Altobella*, the interstate activities relied upon by the Government were the acts of others and were not actively sought or made a part of the illegal activity of the accused. There was no showing that defendant's lottery in any way depended upon or included interstate operations. Unlike *United States v. Miller*, 379 F.2d 483 (7th Cir. 1967), defendant neither 'used' nor 'caused to be used' any interstate facility as an instrumental part of his illegal operations. We must therefore conclude that no federal crime was committed, and that the State of Indiana is the only appropriate authority to punish defendant for maintaining this local lottery."

See, also, *United States v. Kahriger*, 345 U.S. 22 at 40 (1953), indicating that a purely local activity ought not come within the purview of federal jurisdiction.

II.

The conviction on conspiracy was inconsistent with the charge of syndicated gambling under 18 U.S.C. Section 1955 since concerted action is an indispensable element of the gambling charge.

We recognize that the Court below has already considered arguments along these lines in *Becker* and *Fiorella*, *supra*.

It is submitted however, that in the case at bar the Court did not charge, as requested, the "chain" and "wheel" conspiracy theories. (See *United States v. Borelli*,

2 Cir. 1964, 336 F.2d 376, 383, cert. denied, 379 U.S. 960, and *Kotteakos v. United States*, 328 U.S. 750 (1946)).

This case is more nearly a case of guilt by conjecture than anything else. There was an utter failure to establish a single conspiracy. The fact that there were two or three neighborhood gambling operations going on at the same time, but completely separately, cannot create a single conspiracy. These people, except for *Margolis*, all lived in the same general neighborhood, but that was the only coincidence. (See *United States v. Vilhotti*, 452 F.2d 1186 (2 Cir. 1971); *United States v. Casalinuovo*, 350 F.2d 62, (2 Cir. 1971); and *United States v. Euphemia*, 261 F.2d 441 (2 Cir. 1958).

Lying uncomfortably close to the borders of due process is the trial court's failure to dismiss the conspiracy charge against the appellants under the ancient rule of the Second Circuit announced in *United States v. Zeuli*, 137 F.2d 845 (2d Cir. 1943) and *United States v. Sager*, 49 F.2d 725 (2d Cir. 1931). The underlying rationale of these cases was stated in remarkably simple language by the late Judge Learned Hand in *United States v. Central Veal and Beef Company*, 162 F.2d 766 (2d Cir. 1947):

> "What it does mean is that when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicated, they may not be indicted for conspiring to commit it if they have in fact consummated it." (162 F.2d at 770.)

Clearly the petitioners come well within the reach of this rule, for under Section 1955 five or more persons must participate together in an illegal gambling operation. In order for criminal liability to attach under this statute,

they must act in combination and in concert. Thus, the virtue of this rule is that it avoids double punishment when the substantive offense itself contemplates an illegal agreement. The parties who act in concert should not be punished a second time for entering into the very same agreement merely because it is called a conspiracy.

This well-reasoned rule has flourished and has been extended to cases of bribery, *Sager, supra;* rebating or railroad charges, *United States v. New York Central and H.R.R. Company*, 146 F. 298 (Cir. Ct., S.D.N.Y. 1906); criminally receiving stolen property, *United States v. Zeuli, supra;* concealing and harboring fugitives, *United States v. Hagan*, 27 F. Supp. 814 (W.D. Ky. 1939).

This rule was acknowledged by the United States Supreme Court, although not applied, in *Gebardi v. United States*, 287 U.S. 112 (1932); *United States v. Katz*, 271 U.S. 354 (1926); and *United States v. Holte*, 236 U.S. 140 (1915).

Of course this principle is inapplicable when the offense can be committed by one of the co-conspirators alone or when those whose cooperation is necessary for commission of the substantive crime conspire with another person to commit the offense.* However, here neither of these exceptions apply and thus it was a cardinal error, reaching due process proportions, for the trial court to compel the petitioners to proceed to trial under both charges.

---

*See *Baker v. United States*, 393 F.2d 604 (9th Cir. 1968); *Reno v. United States*, 317 F.2d 499 (5th Cir. 1963); *United States v. Central Veal and Beef Company*, 162 F.2d 766 (2d Cir. 1947); *United States v. Corallo*, 281 F. Supp. 24 (S.D.N.Y. 1968); *United States v. Cogan*, 266 F. Supp. 371 (S.D.N.Y. 1969); *United States v. Anthony*, 145 F. Supp. 323 (M.D. Pa. 1956).

Reasons for Granting the Writ

The prejudice to the petitioners is obvious. Under the conspiracy charge the petitioners were forced to wallow in a sea of evidence channeled into their case through the conspiracy conduit. Whereas had they only been required to go to trial on the substantive offense this flood of evidence could have been stemmed.

III.

The wiretap orders are invalid because the persons whose conversations were to be monitored, and the types of conversations to be seized were not described with sufficient particularity. Nor was there a probable cause showing that five or more persons were engaged in the same gambling enterprise.

There is a possibility that the United States Supreme Court will determine the validity of the statute authorizing electronic inspection of telephone calls under 18 U.S.C. Section 2515 *et seq.*

The Supreme Court has already granted certiorari in *United States v. Giordano*, (March 1973) *supra*, and we believe, in *United States v. Chamlas* (9th Cir. 1972), 468 F.2d 234. We have been advised that no decision on certiorari has been made with respect to *United States v. Becker, supra.*

Suffice it to say however, the statute authorizing electronic surveillance may well be insufficient and unconstitutional.

In *United States v. Wierzbicki, supra*, the Court indicated many of the shortcomings inherent in the statute.

We maintain that in reviewing the affidavits for the search warrants, there is no indication that the

Reasons for Granting the Writ

Government established that five or more persons were engaged in the *same* gambling enterprise.

In addition, the statute, 18 U.S.C. Section 2518, requires that there be a showing that "other investigative procedures have been tried and failed, or why they reasonably appear to be unlikely to succeed if tried . . .".

In *United States v. De Cesaro*, *supra*, 349 F. Supp. at 551, the Court summarized the requirements of the statute very aptly as follows:

> "In summary, Section 1955 requires as an element of the offense described therein that five or more persons participate in a gambling business. It is obvious that the statute contemplates that five or more persons join together in some manner in the same gambling business in order that that business be declared illegal under the statute. When the recitations of the affidavit are fully considered together, excluding those that do not satisfy the requirements for consideration in determining probable cause as enunciated in *Aguilar* and *Spinelli*, there is no showing that there is probable cause that five or more of the persons named in paragraph 2 of the affidavit, or others are or were participating together in some manner or other in the same gambling business. The affidavit does not contain a showing of probable cause to believe that Section 1955 is being violated or has been violated, or that there is a conspiracy to violate that section. Suppression of the evidence obtained by the wiretap order must follow.

Sufficiency of the Statement Regarding Other Investigative Procedures

"The statute, 18 U.S.C. Section 2518, requires that the application for a wiretap order contain '. . . a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried . . .'. 18 U.S.C. Section 2518(1)(c). A careful scrutiny of paragraphs 50 and 51 of the affidavit, viewed in light of all other recitations in the affidavit and the known difficulty of investigations of gambling activities lead me to conclude that the application for the wiretap order does meet the statutory requirement.

"For the reasons hereinbefore stated, I conclude that there is an insufficient showing of probable cause to believe that 18 U.S.C. Section 1955 has been, is being, or is about to be violated." (Emphasis ours.)

The eavesdropping warrant which was obtained from Judge Cannella upon the application of Assistant United States Attorney Patrick Burke and Federal Bureau of Investigation Agent Edwin Fraumann, followed the statutory requirements by "rote". There was no sufficient demonstration however that "other investigative means" had been used to any extent before application for the eavesdropping warrant was made. The statute requires that all other investigative methods be explored before resort to the drastic remedy of an invasion of privacy is justified.

Agent Fraumann refers to the alleged fact that an unnamed informer told him that gambling was going on among the petitioners except for *Margolis*. The evidence at trial differed sharply from the statement and affidavit. At trial it was evident that no gambler called by the Government had placed any bets with *Ciriello* at any place other than the Waverly Food Market. Yet, in the affidavit of Agent Fraumann for the eavesdropping order, he alleges

that this unnamed informant declared that he had placed bets with *Ciriello* at the Waverly Food Market and at Jim's Athletic Club. There was absolutely no evidence adduced at trial of this fact.

The unnamed informant was perhaps a device used by the Government to obtain the eavesdropping warrant. Under *Rovario v. United States*, 353 U.S. 53, there should have been disclosure made of the name of this informant. The defense, at the trial, had attacked the sufficiency of the warrants. There was no formal hearing made or conducted on the actual sufficiency of the warrant itself at the trial.

The problem, as is evidenced by this case, is that the Government makes general statements but does not satisfy the statutory requirements as set forth that they had exhausted all other investigative methods, since there is only a token compliance with this aspect.

In addition, Section 1955 of Title 18 of the United States Code requires that there be five or more persons engaged in the *same* gambling operation. The application and the affidavit for the eavesdropping warrant discussed the fact that bets were placed with five of the six petitioners, but do not reveal whether or not they are engaged in the *same* gambling operation. As a matter of fact, different locations are mentioned and the trial evidence would seem to negate the verity of the affidavit of Agent Fraumann.

IV.

Section 1955 of Title 18 of the United States Code is unconstitutional.

Under the Ninth and Tenth Amendments of the United States Constitution, the definition and prosecution

of local intrastate crimes are reserved for the states. Through Section 1955, the federal government attempts to exert jurisdiction over gambling activities, which in the case at bar are purely local and there is no evidence whatsoever that they have an effect upon interstate commerce. There is no indication at all that any calls or other transactions were made outside the State of New York.

We recognize that the Court below has sustained the constitutionality of this Section, but we do not believe that there has been a definitive opinion in the United States Supreme Court on the subject. We maintain that the section is unconstitutional on its face and also as applied in the case at bar.

We have gone into the fact, to some extent, that this was a purely neigborhood, local gambling enterprise conducted on the one hand by *Muscenti* and *McCauley*, and perhaps *Felice*, and on the other hand by *Ciriello* and *Bisaccia*, at a completely different location and under different circumstances. (*Bisaccia* and *Ciriello* conducted a full time grocery while *McCauley* ran a full time Athletic Club, and *Felice* and *Muscenti* frequented the Debonaire Club).

No substantial or even significant amounts of money was bet since the operations were so small and local in nature. No effect of this activity on interstate or foreign commerce is discernable and therefore this case falls outside of that class of conduct which the Congress declared was an "octopus-like" organized type of racketeering.

Moreover, the statute does not require that the "conducting . . . of an illegal gambling business" be wilful or knowing. Thus a person can be found guilty of a federal

felony without knowingly or wilfully committing any of the acts proscribed under the Section. Wilfulness and knowing performance of an act has been the traditional requirement for a federal felony.

The statute is further unconstitutional since it reaches all gambling activity between various persons, regardless of the number of transactions, and irrespective of whether it is inter or intra-state in nature.

For example, if 5 local merchants or ballplayers or the like decided to "book" a single football game and accepted one bet of $2,000, under the Government's theory, they would violate this statute.

The federal courts are opened to a mass of purely local matters that are traditional subjects of state jurisdiction.

In *United States v. Bass, supra*, 404 U.S. 336 (1971), and *United States v. Perez, supra*, 402 U.S. 146 (1971), we have seen that where Congress intends to pre-empt the field, it has no difficulty in making itself clear (e.g., *Perez*).

The general rule inherent in American Federalism is that the federal government ought not interfere with the enforcement of state law over crimes traditionally prosecuted by state courts.

Douglas v. City of Jeanette, 319 U.S. 157; *Stefanelli v. Minard*, 342 U.S. 117; and *Pugach v. Dollinger*, 277 F.2d 739 (2 Cir. 1960), Aff'd 365 U.S. 458.

This statute elevates a state misdemeanor to that of a federal felony without any need to show an impact on interstate commerce or that the activity is co-mingled with interstate transactions.

Reasons for Granting the Writ

The legislative determination, set forth *supra*, only refers to large-scale ("octopus-like") organized racketeering, not local gambling offenses. Virtually every gambling misdemeanor in the country would become subject to federal prosecution if this Court sustains the viability of this case under Section 1955.

It should also be noted that the statute is unconstitutional as it is a Bill of Pains and Penalties under the prohibition of Bill of Attainder provisions of the Constitution (Art. 1, Sections 9, 10, United States Constitution), since it *legislatively presumes* the persons accused of Section 1955 violations to be "guilty!" of the state crime of gambling without any indictment or information or trial.

Cummings v. Missouri, 4 Wall. 277, 320; *United States v. Lovett*, 328 U.S. 303, 322; *Drehman v. Stifle*, 8 Wall. 595, 601; 16A C.J.S. Const. Law, Sections 452, 455, "Bill of Attainder".

The accused is also deprived of due process of law by the fact that a *presumption of guilt* of the state gambling offense is presumed.

This raises the consideration of the denial of equal protection of the laws since persons charged in the state with gambling offenses are entitled to be tried under the safeguards of due process (Fifth and Fourteenth Amendments).

Thus, the statute is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING ANOLIK
Attorney for Petitioners

APPENDIX A – ORDER OF U.S. COURT OF APPEALS

(Dated September 10, 1973)

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of September one thousand nine hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD

HON. HENRY J. FRIENDLY

HON. WILFRED FEINBERG

Circuit Judges,

United States of America,

Plaintiff-Appellee,

v.

Sol Margolis, a/k/a "George", Rocco Bisaccia, a/k/a "Rocky", Eugene Ciriello, a/k/a "Blue", Mario Felice, a/k/a "Loaf", Frank Muscenti, a/k/a "Marggie" and John McCauley, 73-1718

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Order of U.S. Court of Appeals

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO,
Clerk